93-410

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN B. UPP, individually and on behalf of all others similarly situated,

Petitioner,

v.

MELLON BANK, N.A.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

C. Oliver Burt, III, Esq.
Counsel of Record
Michael D. Gottsch, Esq.
Chimicles, Burt & Jacobsen
One Haverford Centre
361 W. Lancaster Avenue
Haverford, PA 19041
(215) 642-8500

Counsel for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Where plaintiffs in a class action, in order to halt future wrongdoing by the defendant, seek an injunction which, if granted, would result in defendant losing millions of dollars in revenue, is the district court deprived of diversity jurisdiction for failure of the action to satisfy the jurisdictional amount merely because no plaintiff individually has more than $50,000 at stake and plaintiffs also seek damages as compensation for defendant's past wrongdoing?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John B. Upp, on his own behalf and on behalf of the class of all others similarly situated, certified by the district court, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 18, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, reported at 994 F.2d 1039 (3d Cir. 1993), is reproduced in the Appendix at App. 1 through 24. The District

Court's Findings of Fact and Conclusions of Law, reported at 799 F. Supp. 540 (E.D. Pa. 1992), are reproduced in the Appendix at App. 25 through 38.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1993. App. 1. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on June 18, 1993. App. 44-45. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Fed. R. Civ. P. 23 (a) and (b)

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of
>
> **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

This case concerns a judgment, having an ultimate value in the tens of millions of dollars, which the District Court entered against Mellon Bank after a bench trial because it found that the fees Mellon charged its trust customers for sweeping cash from their accounts during a ten year period were unlawful. The Court of Appeals reversed that judgment because it determined that the

amount in controversy requirement for diversity jurisdiction was not satisfied.

John Upp, the beneficiary of trusts administered by Mellon Bank, N.A., sued Mellon on behalf of himself and those similarly situated. The complaint alleged tha' Mellon charged unreasonable fees for "sweeping," *i.e.*, automatically investing the cash balances of the class members' trust accounts, and that such unreasonable charges violated Pennsylvania law. App. 54. The complaint sought an injunction to prohibit Mellon from continuing to collect the unlawful sweep fees and to require Mellon to provide trust account beneficiaries with adequate disclosure about the sweep fees. App. 55-56. The complaint also sought compensatory and punitive damages. App. 55. Diversity of citizenship pursuant to 28 U.S.C. § 1332(a) provided the basis for subject matter jurisdiction, as Upp and Mellon resided in different states and the matter in controversy exceeded $50,000.[1] App. 46-47.

The District Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction and Defendant's motion for reconsideration. On May 29, 1992, the District Court certified the plaintiff class under Fed. R. Civ. P. 23(b)(2) and (b)(1)(A). App. 40-41. Mellon sought

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[1] Neither Upp nor any other class member was able to bring a class action in state court because in Pennsylvania all cases involving trusts are required to be brought in the Orphans' Court, *see* Pa. Cons. Stat. Ann. §§ 711(1) and (2), where the class action procedure cannot be utilized. *See In re Estate of Freedman*, 1 Fid. Rep. 2d 60 (O.C. Alleg. 1986), *aff'd*, 453 A.2d 651 (Pa. Super. Ct. 1982).

reconsideration, and on June 24, 1992 the District Court denied that motion, explaining that a class action was maintainable under Rule 23(b)(2) "because defendant Melon [sic] has allegedly acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." App. 42-43. The District Court found certification under Rule 23(b)(1) also to be appropriate. *Id.*

Beginning on August 3, 1992, the District Court conducted a non-jury trial. On August 7, 1992, the District Court entered judgment in favor of Plaintiff, directing Mellon to reimburse to class members' trust accounts all sweep fees Mellon had ever charged them plus interest, and awarding $75,000 in punitive damages to Plaintiff Upp. App. 39. In its Findings of Fact and Conclusions of Law entered the same day, the District Court found that Mellon's sweep fees lacked any rational justification and were unreasonable in violation of Pennsylvania law. App. 28-29 and 34-37. The Court found that the sweep fees merely duplicated other fees Mellon charged for managing the trust accounts, amounting to "double dipping." App. 28-29. It also found that Mellon incurred only a *de minimis* expense to provide the sweeping service – which expense did not justify the sweep fees – and that Mellon charged the sweep fees in order to compensate for its own loss of revenue. App. 33 and 36. Such revenue loss resulted from Mellon's inability to continue investing for its own benefit the cash balances belonging to its fiduciary customers – a practice Mellon followed until the

Comptroller of the Currency in 1982 promulgated a regulation requiring fiduciary account balances to be invested promptly for the benefit of beneficiaries. App. 30.

The District court found that Mellon had collected more than $55 million in sweep fees from 1981 through 1991, as follows:

1981	$2,330,000
1982	2,032,000
1983	2,099,000
1984	2,995,000
1985	2,974,000
1986	4,899,000
1987	7,299,000
1988	8,028,000
1989	7,097,000
1990	7,984,000
1991	7,901,000
	$55,638,000

App. 33. Thus, Mellon's collection of the sweep fees was a continuing practice, and as of the end of 1991 Mellon was collecting sweep fees at the rate of more than $7 million annually. An injunction prohibiting Mellon from continuing to collect such sweep fees would have resulted in Mellon losing these revenues in the future.

The Court of Appeals vacated the judgment of the District Court. App. 24. The Court of Appeals held that the matter in controversy did not exceed $50,000 because there was no record evidence that any class member had been charged sweep fees totalling more than $50,000 and because the Supreme Court of Pennsylvania (which had not spoken on the subject) would be unlikely to permit

punitive damages against a trustee for a breach of fiduciary duty. App. 12, 15, and 21. The Court of Appeals expressly refused to measure the jurisdictional amount by the defendant's cost of complying with an injunction, and stated that doing so would eviscerate the holding of *Snyder v. Harris*, 394 U.S. 332 (1969), prohibiting the aggregation of class members' claims in order to meet the jurisdictional threshold. App. 22.

REASONS FOR GRANTING THE WRIT

1. This Court Should Resolve How The Amount In Controversy Is To Be Measured In Actions Seeking Injunctive Relief So That *Hunt v. Washington State Apple Commission* Will Be Uniformly Applied By The Lower Courts.

This case concerns the extremely important issue of the subject matter jurisdiction of the federal courts. It presents a significant question regarding the construction of the amount in controversy requirement for diversity jurisdiction over injunctive actions.

This Court's long-established rule, originally announced in *Mississippi & Mo. R.R. v. Ward*, 67 U.S. (2 Black) 485 (1862), and reaffirmed in *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333, 347 (1977), is that the amount in controversy in actions seeking injunctive or declaratory relief is measured by the "value of the object of the litigation." *Hunt*, 432 U.S. at 347 (citations omitted). This rule has proven difficult to apply in practice and has produced inconsistent results.

Judge Learned Hand has noted that the value-of-the-object test is "at best ambiguous." *M&M Transp. Co. v. City of New York*, 186 F.2d 157, 158 (2d Cir. 1950). Furthermore, the two leading treatises on federal practice have lamented the lack of consistent judicial treatment the test has received. *See* 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3725 at 432 (2d ed. 1986) [hereinafter *Wright*]; 1 James Wm. Moore and John E. Kennedy, *Moore's Federal Practice* ¶ 0.91[1] at 815-16 (2d ed. 1993) [hereinafter *Moore*]. Aside from enunciating the value-of-the-object rule itself, this Court has never addressed how the amount in controversy should be measured in actions seeking injunctive relief. The lack of this Court's specific direction has enabled considerable disarray to flourish in the lower federal courts, fostering uncertainty and leading to inconsistent outcomes.

The lower federal courts have used three different interpretations of the value-of-the-object rule, or "*Hunt* rule." Traditionally, they applied the rule according to the "plaintiff viewpoint," measuring the amount in controversy by the value to the plaintiff of the relief sought. *See, e.g., City of Milwaukee v. Saxbe*, 546 F.2d 693, 702 (7th Cir. 1976); *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *Massachusetts State Pharm. Ass'n v. Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 (8th Cir. 1970). While the plaintiff viewpoint rule is easy to apply in cases where damages alone are sought, it is awkward and difficult to apply in cases where injunctive relief is sought. Such difficulty stems from the fact that injunctive relief is

sought to prevent future harm, the value of which cannot be quantified at the time relief is sought.

More recently, primarily in actions seeking injunctive or declaratory relief, courts have instead applied the "defendant viewpoint" or "either viewpoint" rule, measuring the matter in controversy by the effect of the judgment on either the plaintiff or the defendant. *See, e.g., Justice v. Atchison, Topeka and Santa Fe Ry.*, 927 F.2d 503, 505 (10th Cir. 1991) (class action for damages and injunctive relief); *Okla. Retail Grocery Ass'n v. Wal-Mart Stores, Inc.*, 605 F.2d 1155, 1160 (10th Cir. 1979) (class action seeking injunction); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 395 (7th Cir. 1979) (individual action seeking injunction); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978) (class action seeking injunctive and declaratory relief); *Williams v. Kleppe*, 539 F.2d 803, 804-805 n.1 (1st Cir. 1976) (declaratory judgment action having multiple plaintiffs); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 472 (D.C. Cir. 1975) (class action seeking injunctive and declaratory relief). *Cf. Duderwicz v. Sweetwater Sav. Ass'n*, 595 F.2d 1008, 1014 (5th Cir. 1979) (applying either viewpoint in individual damage action); *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 122 n.3 (1st Cir. 1976) (applying defendant viewpoint rule in suit by state against federal agency for civil penalty); *Berman v. Narraganset Racing Ass'n*, 414 F.2d 311, 314-15 (1st Cir.), *cert. denied*, 396 U.S. 1037 (1970) (applying either-viewpoint rule to damage claim); *but cf. Carey v. Pennsylvania Enterprises, Inc.*, 876 F.2d 333, 337 n.2 (3d Cir. 1989) (implicitly applying plaintiff viewpoint rule to individual action for an injunction). Professor Moore has characterized the either viewpoint rule as the "clear trend" in

contemporary case law, adding that it is now possibly the majority view. 1 *Moore* ¶ 0.91[1] at 817-18. The third approach, usually applied in removal cases, measures the matter in controversy from the viewpoint of the party invoking federal jurisdiction. *See* 1 *Moore* ¶ 0.91[1] at 817 (collecting cases).[2]

Although the courts of appeals generally have applied the defendant viewpoint or either viewpoint interpretation of the *Hunt* rule in actions seeking only injunctive relief, some have failed to do so in class actions where damages also are sought. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 683-84 (9th Cir. 1976); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970). Such courts reason, as did the Court of Appeals below, that applying the defendant or either viewpoint rule would eviscerate the holding of *Snyder v. Harris*, that separate and distinct damage claims of class members may not be aggregated to reach the requisite jurisdictional amount.

There is no reason for treating class actions seeking injunctive relief differently from individual actions seeking injunctive relief for purposes of measuring the amount in controversy. Whether in an individual or class action, so long as the jurisdictional amount is satisfied, measuring it from the defendant's viewpoint is consistent

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[2] Professor Moore criticizes this approach as potentially inconsistent with the removal statute, 28 U.S.C. § 1441(c), which provides that a case can be removed from state court only if it could have been brought originally in federal court. 1 *Moore* ¶ 0.91[1] at 817.

with the purpose of the amount in controversy requirement: to assure the substantiality of suits brought in federal court. *See generally* 7A Wright § 3701 at 10 and n.62 (citing S. Rep. No. 1830, 85th Cong., 2d Sess. No. 4 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 3099, 3101); 1 *Moore* ¶ 0.91[1] at 819 ("The purpose of the amount in controversy requirement is to ensure the substantiality of the suit itself, not solely the amount which the plaintiff stands to recover."). Thus, if the jurisdictional amount in a case seeking an injunction is satisfied when measured from either the plaintiff's or the defendant's viewpoint, the case should be permitted to proceed in federal court. Indeed, Professor Moore argues that while the plaintiff viewpoint rule has the benefit of certainty and relative simplicity, "it should not blind courts to the realities of the magnitude of a controversy." 1 *Moore*, ¶ 0.91[1] at 819. There is thus a need for this Court to provide a uniform rule by which to measure the amount in controversy in injunction cases so that *Hunt* will be applied uniformly.

This action illustrates the need for a uniform rule. Plaintiff sought an injunction to prohibit Mellon from continuing to collect unlawful sweep fees of more than $7 million annually, as well as damages for past unlawful sweep fees. App. 55-56. If the action were one exclusively seeking an injunction, the requisite amount in controversy would have been satisfied because under the majority approach the rule of *Hunt* would have been applied from the defendant's viewpoint. However, because the action also sought damages to remedy past misconduct, the Court of Appeals held that subject matter jurisdiction

was lacking since Plaintiff's damage claim failed to satisfy the rule of *Snyder*. App. 22.

The Court of Appeals arbitrarily limited its inquiry into the "matter in controversy" to the value of Plaintiff's individual claim for damages, refusing to consider the classwide injunction that Plaintiff requested. App. 23. Such an arbitrary determination is contrary to this Court's long-established view of the scope of the "matter in controversy." In *Smith v. Adams*, 130 U.S. 167, 175 (1889) the Court explained:

> [O]ur appellate jurisdiction in this case depends upon whether the amount in dispute, exclusive of costs, exceeds the sum designated. *By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken.* It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment.

Id. (emphasis added).

This action involved two issues: whether the standardized sweep fee that Mellon charged class members was unlawful and whether Mellon should have been required to cease its unlawful conduct, which applied generally to the class. The object of this suit was to stop Mellon from charging sweep fees unlawfully. Under this Court's time-honored rule, Plaintiff's request for a class-

wide injunction was an important part – possibly the most important part – of the matter in controversy.

Injunctive relief looks to the future. *Douglas v. City of Jeannette*, 319 U.S. 157, 165 (1943); *Penn Terra Ltd. v. Department of Environ. Res.*, 733 F.2d 267, 277 (3d Cir. 1984). A party is entitled to the equitable relief of an injunction where that party has no adequate remedy at law. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959). A plaintiff lacks an adequate legal remedy where a monetary award would be difficult or impossible to measure. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). A legal remedy is also inadequate where, as here, Plaintiff would be required to bring a multiplicity of successive damage suits in order to obtain complete relief. *Douglas*, 319 U.S. at 165. Since Mellon's wrongdoing was continuing, Plaintiff was entitled to the requested injunction in order to prevent future harm, which was difficult or incapable of measurement, and in order that he would not be required to bring successive suits to obtain relief.

If the requested injunction had been granted Mellon would have been required to stop charging unlawful sweep fees, thereby losing more than $7 million annually in future revenues. Apparently considering itself constrained by *Snyder* from factoring the requested injunctive relief into the amount in controversy determination, the Court of Appeals made that determination based solely upon Plaintiff's claim for damages for past harm despite the fact that Plaintiff also sought significant

injunctive relief to prevent future harm.[3] The same result pertained in the decisions of the Court of Appeals for the Ninth Circuit in *Snow* and *Southern Pacific* and that of the Tenth Circuit in *Lonnquist*.

This Court has never spoken on how the amount in controversy should be measured in diversity actions seeking injunctions. In *Snyder*, only damages were sought, and this Court has never applied the *Snyder* rule to an action also seeking injunctive relief. The *Snyder* Court did not mention the value-of-the-object rule,

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[3] In measuring the jurisdictional amount, the Court of Appeals refused to consider the potential enormous loss of revenue to Mellon, stating that this action was one seeking primarily money damages. App. 22-23. Contrary to its own precedent, the Court viewed Plaintiff's requested injunction merely as one requiring the payment of money. *See Penn Terra*, 733 F.2d at 277 (A money judgment compensates for *past* wrongful acts, and "it is unlikely that any action which seeks to prevent culpable conduct *in futuro* will . . . manifest itself as an action for a money judgment . . . "). Plaintiff's damage claim could as well be viewed as secondary to his request for a class-wide injunction. *See Rota v. Bhd. of Ry., Airline and S.S. Clerks*, 64 F.R.D. 699, 707 (N.D. Ill. 1974) (in class action to enjoin collection of allegedly invalid increase in union dues, the court stated that "even though there was a claim for money damages, the primary relief sought is injunctive. If the dues increase is found illegal, plaintiff will have proven that the union uniformly and simultaneously violated the rights of its members as a whole, making appropriate final injunctive relief with respect to the class as a whole." The court therefore certified the class under Rule 23(b)(2) instead of (b)(3).). The Court of Appeals further inappropriately limited its consideration of injunctive relief to Plaintiff's separate request for an injunction requiring Mellon to provide adequate notice of its sweep fees and to tie future sweep fees to its cost of sweeping, and determined that the record was incomplete as to such costs. App. 23.

which has been the law since 1862. Obviously, *Snyder* did not abrogate that rule.

Although the matter remains unsettled, previous decisions of this Court can be read as implicitly favoring the defendant or either viewpoint interpretation in applying the value-of-the-object rule. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court concluded that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." *Id.* at 98. As support for its conclusion, the Court cited, *inter alia*, *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940), an early decision applying the defendant viewpoint rule. Additionally, this Court in *Flast v. Cohen*, 392 U.S. 83 (1968), a taxpayer appeal, did not mention the monetary value of the taxpayer's claim but stated that "the challenged program involves a substantial expenditure of federal tax funds." *Id.* at 103. The United States Court of Appeals for the District of Columbia Circuit has noted that *Flast* may be indicative of this Court's view that the defendant's viewpoint may be used to establish the jurisdictional amount in certain cases. *See Tatum v. Laird*, 444 F.2d 947, 951 n.6 (D.C. Cir. 1971), *rev'd on other grounds*, 408 U.S. 1 (1972). Finally, in *Healy v. Ratta*, 292 U.S. 263 (1934), a suit to enjoin the enforcement of a license tax, this Court held that the amount of the tax was the matter in controversy, "since payment of it would avoid the penalty and end the dispute." *Id.* at 268. In this action, the recovery of damages alone would not end the dispute. The dispute could not end without an injunction prohibiting Mellon from charging unlawful sweep fees in the future.

The result of the inconsistent application of *Hunt* has been to deny access to the federal courts to a class of substantial cases, having significant amounts in controversy, over which Congress intended the federal courts to exercise jurisdiction. It seems anomalous to construe the amount in controversy requirement to permit federal jurisdiction over simple individual actions involving only $50,000 but not over class actions involving requests for injunctive relief far in excess of that amount.

At best the law is unclear as to how the value-of-the-object rule of *Hunt* is to be applied. Future cases in the courts of appeals are unlikely to settle the matter. Only a determination from this Court can settle the issue as to the appropriate means of measuring the amount in controversy in cases seeking injunctions, and provide uniformity on a significant matter of federal subject matter jurisdiction. In light of the need to provide for uniform construction of the jurisdictional statutes governing the federal courts, this Court should intervene to settle the law as to how *Hunt* is to be applied by the lower courts.

2. The Remedial Policy Of Rule 23 Of The Federal Rules of Civil Procedure Will Be Frustrated In The Absence Of Clear Direction From This Court On Measuring The Amount In Controversy In Diversity Actions Seeking Injunctive Relief.

Rule 23 of the Federal Rules of Civil Procedure is a remedial rule that should be construed and applied liberally. *See* 3B *Moore* ¶ 23.02[4] at 23-70 (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968)); *accord In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert.*

denied, 493 U.S. 959 (1989). The district courts are afforded substantial discretion in determining whether the requirements of Rule 23 are met. Only an abuse of that discretion warrants reversal. *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991); *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988); *cf. Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448 (3d Cir.) (where district court applies proper criteria, court of appeals will defer to district court's exercise of discretion), *cert. denied*, 434 U.S. 1086 (1978).

Of necessity, where the district court certifies a class under subdivision (b)(2) of Rule 23, the court has determined based upon the record that final injunctive or declaratory relief for the whole class will be appropriate if plaintiff prevails on the merits because the party opposing the class has acted on grounds generally applicable to the class. *See* Fed. R. Civ. P. 23(b)(2). In circumstances where the district court has determined that class-wide injunctive relief is appropriate, it would frustrate the proper functioning of Rule 23 to hold that the value of the underlying claim for an injunction which constitutes the "matter in controversy" may not be considered in measuring the jurisdictional amount.

Resolving the inconsistent application of *Hunt* so that the district courts must consider the value of a legitimate request for an injunction in measuring the jurisdictional amount will not eviscerate *Snyder*. The plaintiff in an action seeking both injunctive relief and damages will not be able to circumvent *Snyder*, and indeed cannot do so now, by demanding an injunction requiring the payment of money. In connection with the class action determination, the party opposing the class ordinarily will have a

full opportunity to develop a record that will expose any such request as a disguised damage claim, as the court will hold an evidentiary hearing if appropriate. *See Int'l Woodworkers of Am., AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981); *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (5th Cir. 1978); *Huff v. N.D. Cass Co. of Ala.*, 485 F.2d 710, 713 (5th Cir. 1973); *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 37 (E.D. Va. 1981); *Cobb v. Avon Products, Inc.*, 71 F.R.D. 652, 654 (W.D. Pa.), *appeal dismissed*, 565 F.2d 151 (3d Cir. 1977). The district courts have the discretion to deny class treatment under Rule 23(b)(2) where such treatment is not supported by the record, including cases where the requested injunction amounts merely to a request for the payment of money. Exercising that discretion, and applying the well-established rule that the diversity jurisdictional statute is to be strictly construed, there is little risk that the district courts will allow class actions to remain in federal court where doing so would serve to eviscerate *Snyder*.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision below.

Dated: September 13, 1993

Respectfully submitted,

C. Oliver Burt, III, Esq.
Counsel of Record
Michael D. Gottsch, Esq.
Chimicles, Burt & Jacobsen
One Haverford Centre
361 W. Lancaster Avenue
Haverford, PA 19041
(215) 642-8500

Counsel for the Petitioner

APPENDIX

Parker W. PACKARD; John B. Upp, Individually and on behalf of all other similarly situated,

John B. Upp, Appellee,

v.

PROVIDENT NATIONAL BANK; Mellon Bank (EAST), N.A., Individually and on behalf of all others similarly situated,

Mellon Bank, N.A., Appellant,

Pennsylvania Bankers Association; Probate and Trust Law Section of the Allegheny County Bar Association; American Bankers Association; Association of Bank Holding Companies; and Independent Bankers Association of America, Amicus-Appellant.

No. 92-1753.

United States Court of Appeals,
Third Circuit.

Argued March 29, 1993.

Decided May 18, 1993.

Sur Petition for Rehearing
June 18, 1993.

W. Thomas McGough, Jr. (Argued), Walter T. McGough, Gregory B. Jordan, Perry A. Napolitano, Reed, Smith, Shaw & McClay, Pittsburgh, PA, for appellant Mellon Bank, N.A.

C. Oliver Burt, III (Argued), Brenda M. Nelson, Robin Resnick, Mark C. Rifkin, Miles B. Rittmaster, Greenfield & Chimicles, Haverford, PA, for appellee John B. Upp.

Louise A. Rynd, Pennsylvania Bankers Ass'n, Harrisburg, PA, for amicus-appellant Pennsylvania Bankers Ass'n.

John F. Meck, Houston, Houston & Donnelly, Pittsburgh, PA, for amicus-appellant Allegheny County Bar Ass'n.

John J. Gill, Michael F. Crotty, American Bankers Ass'n Washington, DC, for amicus-appellant American Bankers Ass'n.

Richard M. Whiting, Association of Bank Holding Companies, Washington, DC, for amicus-appellant Association of Bank Holding Companies.

Leonard J. Rubin, Bracewell & Patterson, Washington, DC, for amicus-appellant Independent Bankers Assoc. of America.

Before: SLOVITER, Chief Judge, COWEN and NYGAARD, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

Mellon Bank appeals from a final judgment of the district court holding certain of its trust fees unreasonable, ordering restitution of those fees to a class of trust beneficiaries and awarding punitive damages to the class representative. Because it is evident to a legal certainty that the requisite amount in controversy for diversity jurisdiction was never recoverable, the district court lacked subject matter jurisdiction. We will therefore vacate its judgment and remand the case for dismissal.

App. 3

I.

A.

Mellon Bank serves as the trustee of thousands of trusts of varying types. One of its duties as a trustee is to insure that trust assets are invested productively at all times. One of the more problematic aspects of this duty has been the question of how to invest temporarily idle trust account cash. For many years, banks would simply transfer this money to non-interest bearing accounts, in part because of the administrative cost and complexity of investing these usually small sums and in part because suitable short-term investment vehicles were not available. Although there was nothing illegal or improper about this practice, it gave banks a windfall from the "float" and deprived beneficiaries of full return on their funds.

In the early 1980's, computer technology made it cost-effective to invest small sums of idle cash for short periods of time. In addition, various money market funds, which were suitable short-term investments, became available. In 1981, Girard Bank (now merged into Mellon Bank, N.A.) began offering a service known as "sweeping." A sweep service looks daily for idle cash and invests it in an interest-bearing vehicle until the cash is either invested long-term or distributed to the beneficiary. Shortly thereafter, Mellon itself began to develop a sweeping system. In late 1982, the Comptroller of the Currency promulgated regulations under which national banks were required to sweep trust funds.

At that time, Pennsylvania law was silent on whether banks could charge the trust for the sweeping service.

Nevertheless, both Mellon and Girard began charging "sweep fees" of 30 and 37½ basis points, respectively.[1] Both banks sent notices informing their customers of the sweep fee. In 1984, Pennsylvania enacted a statute authorizing reasonable sweep fees in addition to whatever other compensation the trustee was entitled to receive. *See* 20 Pa.Cons.Stat.Ann. § 7315.1 (Purdon Supp.1992).

B.

John B. Upp is the beneficiary of three trusts administered by Mellon Bank, all subject to sweep fees. Between 1981 and 1991, Mellon Bank charged Upp $4,012.14 in sweep fees. Upp and Parker W. Packard, a beneficiary of trusts managed by Provident National Bank, filed this diversity suit in district court. Upp and Packard alleged, on behalf of themselves and a class of similarly situated plaintiffs estimated to number at least 5,000, that Mellon, Provident and a class of defendant banks breached their fiduciary duties by, *inter alia*, charging unreasonably high sweep fees and by not adequately disclosing those fees.[2]

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[1] Under a 37½ basis point fee, if $100 were invested for an entire year, the fee would amount to 37½ cents. The beneficiary would pay that amount in return for having his or her funds invested and receiving interest computed at market rates. Under the former practice, no sweep fee would be charged but the beneficiary would earn no interest whatsoever. In 1985, Mellon increased its sweep fee to 50 basis points.

[2] The district court initially refused to certify the plaintiff class, but upon a renewed motion by plaintiffs, granted certification. No defendant class was ever certified, however. The district court later approved a settlement between Provident

Plaintiffs sought compensatory and punitive damages, and to enjoin the defendants from collecting excessive sweep fees in the future.

Defendants first moved to dismiss for lack of subject matter jurisdiction on the ground that the $50,000 jurisdictional amount was not satisfied. Fed.R.Civ.P. 12(b)(1). The motion also requested the district court, in the alternative, to abstain in light of the special expertise and jurisdiction of the Orphans' Court in dealing with trusts. *See Reichman v. Pittsburgh Nat'l Bank*, 465 F.2d 16 (3d Cir.1972). On November 12, plaintiffs filed an opposing memorandum. The next day, the district court denied the motion without argument or explanation. Defendants then answered the complaint.

In April 1992, Mellon filed accountings in the Orphans' Court of Montgomery County in two of Upp's trusts. These accountings specifically raised the propriety of the sweep fees. Upp removed the accountings to federal district court, where they were assigned to the same district judge presiding over the class action. Upon motion from Mellon, the district court remanded the accountings back to the Orphans' Court, citing *Reichman* and stating that "[r]emand is appropriate in view of the range of issues regarding defendant's exercise of its fiduciary duties which could be raised in these accounting [sic], and the Orphan [sic] Court's particular expertise in the field of supervising the administration of trusts

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National Bank and its trust beneficiaries. That settlement did not involve money damages of any kind. After this partial settlement, the case proceeded between Mellon Bank and its trust beneficiaries.

and estates."[3] A month later, the Orphans' Court issued a decree *nisi* approving Mellon's accounting as to Upp, including the propriety of the sweep fees. *Bigelow Trust*, 12 Fiduc.Rep.2d 256 (O.C.Mont.Co. 1992).[4]

On June 5, 1992, Mellon renewed its motion to dismiss for lack of subject matter jurisdiction or in the alternative to abstain. On June 23, three days *before* plaintiffs filed their memorandum in opposition, the district court once again denied the motion without argument or explanation. On July 24, Mellon moved to stay the proceedings.[5] On July 27, plaintiffs answered. The next day, the district court denied the motion. This time, the district court provided a two page order which stated that because punitive damages were potentially recoverable against a trustee, the jurisdictional amount was satisfied.

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[3] Evidently, the district court viewed the issue of the sweep fees as considerably narrower than the complete accounting it would have to rule on if remand were not granted. Provident had also filed accountings in the Orphans' Court. After plaintiffs removed, the district court remanded here as well. The court relied on the same reasoning and caselaw, but expressly declined to address whether *Reichman* permitted or required abstention in the class action. Although we are uncertain as to what significance the "narrowness" of the issue should have on the decision to remand as against the decision not to abstain, in light of our disposition, we need not reach this issue.

[4] The Orphans' Court relied on its prior ruling in *Packard Trust*, 12 Fiduc.Rep.2d 148 (O.C.Mont.Co.1992), which held that the sweep fees were proper as to class representative Packard.

[5] That same day, Mellon petitioned this court for writs of prohibition or mandamus enjoining the district court to either abstain or dismiss the case for lack of subject matter jurisdiction. A motions panel of this court denied the petition on July 29.

On August 3-6, the district court conducted a trial on the merits.[6] On August 7, it issued a fifteen page opinion detailing its findings of fact and conclusions of law. *Upp v. Mellon Bank, N.A.*, 799 F.Supp. 540 (E.D.Pa.1992). The court held that Mellon did not inform its customers of the sweep fees "in meaningful terms," and that the sweep fees were excessive and far out of proportion to a reasonable charge for the sweeping service. *Id.* at 542. Additionally, the district court stated that Mellon had "feathered its own nest" at the expense of trust funds, *id.*, that it "double dipped" by charging a sweep fee in addition to the normal trust management fee, *id.*, and that before the practice of sweeping began, Mellon treated idle trust fund cash as a "Christmas Club" for its own benefit. *Id.* at 544.

Based on these findings, the court held that Mellon's conduct was outrageous and showed a bad motive. *Id.* at 545. It then imposed punitive damages of $75,000 in favor of class representative Upp and ordered restitution of all the sweep fees Mellon had ever charged. *Id.* at 546. Notwithstanding this ruling in federal court, the Orphans' Court *en banc* later affirmed the previous decree *nisi* approving both Mellon's accounting and the propriety of the sweep fees.[7]

Mellon timely appealed from the district court's judgment. We have jurisdiction under 28 U.S.C. § 1291.

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[6] Although both parties had filed consents to trial before a United States Magistrate Judge, the district judge chose to conduct the trial himself.

[7] We are informed that this decision is currently on appeal before the Superior Court of Pennsylvania.

II

Mellon's appeal asserts six grounds for reversal: 1. The district court lacked subject matter jurisdiction inasmuch as the amount in controversy requirement was not satisfied; 2. The Orphans' Court adjudication of the accountings collaterally estopped plaintiffs from litigating the sweep fee issue in the district court; 3. The district court abused its discretion in refusing to abstain; 4. The district court erred in certifying the plaintiff class; 5. The district court decided the merits in a manner contrary to Pennsylvania law; 6. The district court erred in its award of compensatory damages. We reach only the first of these contentions.[8]

A.

The question of subject matter jurisdiction is a legal issue over which we exercise plenary review. *York Bank & Trust Co. v. Federal Sav. & Loan Ins. Corp.*, 851 F.2d 637, 638 (3d Cir.1988).

Diversity jurisdiction requires an amount in controversy in excess of $50,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). This provision must be narrowly construed so as not to frustrate the congressional purpose behind it: to keep the diversity caseload of the federal courts under some modicum of control. *See Nelson v.*

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[8] We note, however, that the district court had the power to abstain in deference to the Orphans' Court. *See Ryan v. First Pa. Banking & Trust Co.*, 519 F.2d 572, 575 (3d Cir.1975); *Reichman*, 465 F.2d at 18 (3d Cir.1972); *In re Auerbacher*, 616 F.Supp. 532, 534 (E.D.Pa.1985).

Keefer, 451 F.2d 289, 293-94 (3d Cir.1971) (quoting *Snyder v. Harris*, 394 U.S. 332, 339-40, 89 S.Ct. 1053, 1058, 22 L.Ed.2d 319 (1969); *Healy v. Ratta*, 292 U.S. 263, 269-70, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934)). The person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936).

It is well-settled that in a diversity-based class action, members of the class may not aggregate their claims in order to reach the requisite amount in controversy. *Snyder*, 394 U.S. 332, 89 S.Ct. 1053 *passim*. The Supreme Court has also held that *each* member of the class must claim at least the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973).[9]

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[9] Upp suggests that *Zahn* is no longer good law after the enactment of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367. Upp makes no argument in support of this assertion, but cites two commentators in support of his view. *See* 1 James W. Moore et al., *Moore's Federal Practice* ¶0.97[5], at 927 (1992); Herbert B. Newberg, *Class Actions* § 6.11, at 6-45 through 6-49.

Section 1367(a) extends supplemental jurisdiction to the limits of Article III of the Constitution, subject only to the restrictions of section 1367(b). Section 1367(b) precludes the exercise of supplemental jurisdiction in diversity cases when joinder is accomplished pursuant to Fed.R.Civ.P. 14, 19, 20 or 24, but does not say anything about Rule 23 (class actions). From this, the argument is made that 28 U.S.C. § 1367(a) provides supplemental jurisdiction over diversity class members who do not individually meet the amount in controversy requirement, thus legislatively overruling *Zahn*.

The authors of *Moore's* have retreated from their position based on the statute's legislative history, which states that section 1367 was not intended to affect jurisdictional requirements

In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938), the

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in diversity-based class actions and cites *Zahn*. 1 *Moore's Federal Practice* ¶ 0.97[5], at 927 (1993); *see also* H.R.Rep. No. 734, P.L. 101-650, 101st Cong.2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 6802, 6860, 6875 (1990). Newberg, on the other hand, discounts this history, stating that because the statute is unambiguous on its face, legislative history may not be resorted to according to the Supreme Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991).

This question has spawned a considerable academic debate as well. *See* Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (1991) (academics who assisted in drafting section 1367 assert that legislative history indicates no intent to overrule *Zahn*); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 485-86 (1991) (expressing regret that intent not to overrule *Zahn* is "buried in the legislative history"); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 960 n. 90 (1991) (admitting that the statute could have been better drafted); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 Emory L.J. 963, 981 (1991) (asserting that statutory language overrules *Zahn* and doubting that legislative history can save it); Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 Emory L.J. 31, 56-58 (1992) (indicating that, notwithstanding the legislative history, the language of section 1367 tracks closely the language suggested by the Federal Courts Study Committee, which expressed a desire to overrule *Zahn*); Joan Steinman, *Section 1367 – Another Party Heard From*, 41 Emory L.J. 85, 102-04 (1992) (similar); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz.St.L.J. 849, 973

Supreme Court laid down the standard for determining whether the requisite amount in controversy has been properly alleged:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that . . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less that the jurisdictional amount to justify dismissal. . . . But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.

When it appears to a legal certainty that the plaintiff was never entitled to recover the jurisdictional amount, the case must be dismissed, even if the jurisdictional deficiency becomes evident only after trial. *E.g., id.*, 303 U.S. at 290, 58 S.Ct. at 591; *City of Boulder v. Snyder*, 396 F.2d

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(1992) (section 1367 should not be interpreted as overruling *Zahn*).

To date, neither the Supreme Court nor any United States Court of Appeals has decided this issue. Several district courts, however, have refused to hold that section 1367 overrruled *Zahn* in a class action context. *Mayo v. Key Fin. Servs., Inc.*, 812 F.Supp. 277, 278 (D. Mass.1993); *Averdick v. Republic Fin. Servs., Inc.*, 803 F.Supp. 37, 45-46 (E.D.Ky.1992); *Benfield v. Mocatta Metals Corp.*, 1993 WL 148978 (S.D.N.Y.1993); *Bradbury v. Robertson-Ceco Corp.*, 1992 WL 178648 (N.D.Ill.1992). Because no plaintiff alleges more than $50,000 in compensatory damages and punitive damages may not be recovered against a trustee under Pennsylvania law, we need not and do not resolve the issue.

853, 856 (10th Cir.1968); *Lynn v. Smith*, 193 F.Supp. 887, 894 (W.D.Pa.1961).

It has neither been pleaded nor at any time asserted in this litigation that Upp or any class member is entitled to more than $50,000 in compensatory damages. Indeed, even if every cent of sweep fees Upp paid was unlawfully collected by Mellon, his compensatory damages would be only slightly over $4,000.[10] The complaint does, however, include a demand for punitive damages. When both actual and punitive damages are recoverable, punitive damages are properly considered in determining whether the jurisdictional amount has been satisfied. *Bell v. Preferred Life Assur. Soc'y*, 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943); *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82, 87 (2d Cir.1991); *Klepper v. First Am. Bank*, 916 F.2d 337, 341 (6th Cir.1990).

We have held, however, that when a claim for punitive damages is "patently frivolous and without foundation" because such damages are unavailable as a matter of law, that claim must be stricken from the amount in controversy. *Gray v. Occidental Life Ins. Co.*, 387 F.2d 935, 936 (3d Cir.1968). In addition, when it appears that such a claim comprises the bulk of the amount in controversy

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[10] Moreover, the sweep fees charged the entire class during the years 1981-1991 amounted to $55,638,000. *Upp*, 799 F.Supp. at 544. When this figure is divided by the 5,000 class members estimated by plaintiffs in their complaint, it nets out to approximately $11,000 per member. At trial, however, the number of accounts managed by Mellon's trust department was estimated at 22,000. Although not all of these accounts were subject to a sweep fee, this further dilutes the potential compensatory damages available per class member.

and may have been colorably asserted solely or primarily for the purpose of conferring jurisdiction, that claim should be given particularly close scrutiny. *See Zahn v. International Paper Co.*, 469 F.2d 1033, 1033-34 n. 1 (2d Cir.1972), *aff'd*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). We turn then to the question of whether punitive damages may be recovered in Pennsylvania against a trustee. If they cannot, then this case must be dismissed for want of jurisdiction.

B.

The availability of punitive damages against a trustee is a quintessential state issue which a federal court must resolve by reference to the law as set forth by the state's legislature or highest court. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Here, the Supreme Court of Pennsylvania has not addressed this precise question, so we must predict how it would decide the issue were it confronted with the problem. *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661 (3d Cir.1980). In carrying out that task, we must

> consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand. The rule of *Erie* calls on us to apply state law and not . . . to participate in an effort to change it merely because we doubt its soundness.

Id., 622 F.2d at 663 (quotation omitted); *see also Nationwide Ins. Co. v. Resseguie*, 980 F.2d 226, 230 (3d Cir.1992). Because a federal court's prediction of state law, until and

unless overruled by the state supreme court, tends to "verge on the lawmaking function" of the highest state court, it is critical that the federal court do all within its power to view the problem before it as a state court would, and not through the eyes of a court steeped in federal law. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va.L.Rev. 1671, 1681-82 (1992). Accordingly, it must be recognized that a decision of a lower state court on a point of state law is generally more predictive of what the state supreme court would hold than is a conflicting opinion of a federal court on the same point.

There are few predictors of whether punitive damages may be recovered against a trustee under Pennsylvania law. Upp argues that we should look to analogous decisions of the Pennsylvania courts, which have permitted punitive damages to be imposed on fiduciaries other than trustees. While we agree that these cases must be considered, we do not find them dispositive, helpful, or even particularly predictive of the issue.

In *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 69 (1989), the Supreme Court of Pennsylvania imposed punitive damages on an attorney guilty of malpractice, fraud and intentional withholding of critical information from his client. Likewise, in *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa.Super. 336, 499 A.2d 637, 642-43 (1985), the Superior Court imposed punitives on a stockbroker which had been recklessly indifferent to its client's investment objectives.

In both cases, liability for punitive damages was predicated on Pennsylvania's adoption of section 908(2)

of the Restatement (Second) of Torts. Under that section, "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* Here, Mellon was statutorily entitled to charge its trust customers a reasonable sweep fee. Plaintiffs acknowledged as much in their complaint and never pleaded that Mellon's conduct was outrageous. At worst, Mellon charged its customers too much. Although perhaps it may be argued that Mellon's sweep fees were unreasonable, we cannot believe they could possibly be considered "outrageous" or "reckless," particularly in view of the fact that no court had ever decided what constitutes reasonableness under section 7315.1 until 1992. Moreover, Mellon's fees were comparable to, or even less than, those charged by other banks in the area. Likewise, while the notice Mellon provided its customers was allegedly insufficient, notice *was* provided. Again, perhaps Mellon's conduct was unreasonable, but as a matter of law it cannot be considered outrageous or reckless. Under Pennsylvania law, mere unreasonableness cannot support a claim for punitive damages. *See SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 587 A.2d 702, 704-05 (1991) (quoting *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1098 (1985) (Hutchinson, J.) (plurality opinion) (gross negligence insufficient)).

More important, the law of trusts is different from the law of torts. First, remedies against a trustee are governed by section 205 of the Restatement (Second) of *Trusts*, not section 908 of the Restatement (Second) of *Torts*. Although section 908 provides for punitive damages, section 205 does not, and while the Pennsylvania

courts have not explicitly adopted section 205, they have on two occasions cited it as respectable authority. *See In re Estate of Kurkowski*, 487 Pa. 295, 409 A.2d 357, 361 (1979); *Old Penn Tavern, Inc. v. Kubiak*, 199 Pa.Super. 229, 184 A.2d 140, 142 (1962).

Second, the *corpus juris* of Pennsylvania trust law has been codified in the Probate, Estates and Fiduciaries Code ("PEFC"), 20 Pa.Cons.Stat.Ann. § 101 *et seq.* The PEFC, however, does not authorize punitive damages as a remedy against a malfeasant trustee. In light of Pennsylvania's view that punitive damages are rarely available and subject to strict judicial control, *see Martin*, 494 A.2d at 1096, the absence of statutory authority for such damages in the PEFC militates against predicting their availability. *See Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir.1983) (where D.C. law generally disfavored punitive damages, and plaintiff cited no authority for their application to the case before it, court refused to consider punitive claim in jurisdictional amount).

Third, under sections 701 and 711 of the PEFC, a separate Orphans' Court division of the Courts of Common Pleas has been created with exclusive jurisdiction over testamentary and *inter vivos* trusts. In some Pennsylvania counties, judges are assigned exclusively to the Orphans' Court. The judges of these courts develop an expertise in the law of trusts. With that in mind, we turn to the one Orphans' Court case that has specifically decided that punitive damages may not be recovered against a trustee under Pennsylvania law.

In *Freedman Estate*, 1 Fiduc.Rep.2d 60 (O.C.Allegheny Co.1980) (en banc), certain trust beneficiaries sought

punitive damages against their trustee for, *inter alia*, willful breach of fiduciary duties and misrepresentation. After noting that the Orphans' Court is "a court of equity governed in minute detail" by the PEFC, *id.* at 67, the court held that punitive damages are not recoverable under Pennsylvania law:

> Nowhere in the Probate, Estates and Fiduciaries Code is it provided that a willfully, reckless fiduciary is also subject to exemplary damages although such a fiduciary might be required to pay for actual losses, counsel fees for the objectors and litigation costs. He may also be barred from other compensation. But none of these remedies which have accrued over hundreds of years of practice may be called punitive damages. . . . The objection to punitive damages is sustained and such allegation will be stricken from the complaint.

Id. at 68.[11]

Although a Pennsylvania Orphans' Court decision is not binding on us under *Erie*, such an opinion is "indicative of what the law of Pennsylvania may be." *See Brown v. Moore*, 247 F.2d 711, 721 (3d Cir.1957) (referring to Common Pleas opinions). This is particularly true with respect to *Freedman Estate*, which is a unanimous decision by five judges of the Allegheny County Orphans' Court, sitting *en banc*. These five judges, being specialists in trust law and the proper application of the PEFC, provide

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[11] On appeal, the Superior Court declined to address the issue of punitive damages, on the sole ground that the issue was interlocutory and not properly before the court. *In re Estate of Freedman*, 307 Pa.Super. 413, 453 A.2d 651, 655 (1982).

persuasive insight into how the Supreme Court of Pennsylvania would decide this issue, particularly absent any decisions on point by the state's appellate courts.

C.

While none of these factors alone, with the exception of *Freedman Estate,* may be dispositive, taken as a whole they convince us that punitive damages simply cannot be recovered against a trustee under Pennsylvania law and the case must therefore be dismissed. The district court, however, used a different rationale and reached the opposite conclusion. Its analysis of the issue consisted of the following:

> In an appropriate case, punitive damages may be recoverable from a self dealing trustee. *Mosser v. Darrow,* 341 U.S. 267 [,71 S.Ct. 680, 95 L.Ed. 927] (1951) (reorganization trustee had personal liability for breach of fiduciary duty, even though bankrupt entity suffered no loss); *Schoenholtz v. Doniger,* 657 F.Supp. 899, 913-15 (S.D.N.Y. 1987) (punitive damages recoverable from ERISA trustee). In an analogous context, involving breach of fiduciary duty by a brokerage firm to its customers, the Pennsylvania Superior Court held that an award of punitive damages was appropriate. *Dean Witter Reynolds, Inc. v. Genteel,* 346 Pa.Super. 336, 499 A.2d 637 [sic]. Where there is conduct which, together with the circumstances, including the motive of the wrongdoer and the relation between the parties, is especially egregious, it is within the discretion of the fact finder to award punitive damages. *Id.*

Packard v. Provident Nat'l Bank, No. 91-5229 (E.D.Pa. Jul. 28, 1992) (order denying motion for stay); *see also Upp*, 799 F.Supp. at 546 (citing same cases with more abbreviated analysis).

While we disagree with the district court's citation of *Genteel* as authority in favor of punitive damages for the reasons already stated, we are more troubled by the first two citations. In *Mosser*, a self-dealing trustee in New York was denied compensation and was required to disgorge unlawfully made profits, but was *not* held liable for punitive damages. *Mosser* therefore, is totally inapposite and has no predictive power whatsoever for Pennsylvania law.

Schoenholtz was an ERISA case in which the issue was whether punitive damages were available against a plan trustee. After a detailed statutory analysis, the court looked to traditional trust principles and determined that such damages were generally available under the common law of trusts "where malice or fraud is involved." 657 F.Supp. at 914.

Schoenholtz, however, was decided under principles of federal common law, in a situation where the district court was specifically instructed by Congress to look to traditional principles of trust law, regardless of jurisdiction, in construing the ERISA.[12] Distilling a federal common law rule from the laws of the several states is a far

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[12] In any event, the Second Circuit, in another case dealing with this issue after the district court's decision in *Upp*, disagreed with the *Schoenholtz* holding, stating:

> Trustees generally are not subject to punitive damages at common law for a breach of fiduciary duty.

different inquiry, however, than predicting the law of a single state, which was the task before the district court.

When a district court sets out to predict state law, it sits, in effect, as a state court. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1783, 18 L.Ed.2d 886 (1967). The decisions of that state's own courts must therefore be searched thoroughly and given preeminence, at least in the absence of convincing evidence the state supreme court would not follow them. *See Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 61 S.Ct. 176, 178, 85 L.Ed. 109 (1940). Where the lower courts of the state have addressed the issue before the federal court, the decisions of other states' courts are not especially convincing predictors, unless those decisions represent a majority rule or a strongly emerging trend that the state supreme court would follow in abrogation of the lower state court decisions.[13]

> The exception permitting recovery of punitive damages in cases of fraud or extreme disloyalty is just that – an exception – occasionally awarded in a few states.

Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 286 (2d Cir. 1992) (citing cases).

[13] We completely reject Upp's contention that, because, among the various states, punitive damages represent the majority rule, we should hold them available under Pennsylvania law. *See* George G. Bogert & George T. Bogert, *The Law of Trust and Trustees* § 862 (rev. 2d ed. 1982 & Supp.1992). Although Bogert states that "punitive damages may be awarded where malice or fraud is involved," *Id.*, an examination of the cases cited in the main text and the 1992 supplement reveals that this is a minority rule, followed by perhaps one-fourth of the states. Moreover, the trustees' misconduct in those cases was typically far more egregious than that present here, usually involving fraud or other quasi-criminal actions, sometimes even outright

It appears to us that the district court did not accurately predict Pennsylvania law as it is required to as an *Erie*-bound federal court. It cited only three cases, and with very little explanation of their applicability. Only one case was from a Pennsylvania court, and it did not involve a trustee. In addition, the district court did not consider *Freedman Estate,* which is the single most predictive case on point, and relied instead on two federal decisions, both of which are poor predictors of state law.

It is axiomatic that federal courts are courts of limited jurisdiction, and as such are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case. *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir.1990); *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 36 (3d Cir.1981). Here, it was evident from the face of the complaint that the amount in controversy might be problematic, and Mellon three times moved the district court to examine the question of subject matter jurisdiction. The district court, however, provided a reasoned analysis only on the third order. We are constrained to point out that when a district court dismisses jurisdictional challenges with little or no analysis and then imposes punitive damages after a trial on the merits, two unfortunate perceptions may be fostered in the eyes of the losing party, the bar and the public. First, it may appear as if the court has failed to give the jurisdictional issues the full

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embezzlement. We cannot say, then, that either Bogerts' assertion or their cited cases are sufficient to overcome the countervailing evidence that punitive damages against trustees are not available in Pennsylvania.

attention they require, and second, it may appear that the court's desire to reach the merits of the case has obscured its judgment of its jurisdiction to do so. The purpose of reasoned elaboration is to prevent such perceptions, as well as to insure that the court gives careful consideration to the issue before it.

D.

As a separate ground for affirmance, Upp points out that the complaint included a demand for injunctive relief and argues that we should measure the jurisdictional amount not by the damages of the plaintiffs, but by the costs to Mellon in complying with it. We decline to do so.

In a diversity-based class action seeking primarily money damages, allowing the amount in controversy to be measured by the defendant's cost would eviscerate *Snyder's* holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold. *See, e.g., Snow v. Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir.1977); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir.1970); *National Org. for Women v. Mutual of Omaha Ins. Co.*, 612 F.Supp. 100, 107-08 (D.D.C. 1985). We will not permit plaintiffs to do indirectly that which they cannot do directly.[14] Moreover, we have stated that a

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[14] There are exceptions to the non-aggregation rule, but none apply here. First, aggregation is permitted when class members sue jointly to enforce a common title or right in which they have a common and undivided interest. *Zahn*, 414 U.S. at 294, 94 S.Ct. at 508. Such a common fund situation does not exist here. Rather, plaintiffs asserted that Mellon's sweep fees were excessive. Thus, each class member was injured individually,

plaintiff may not turn what is essentially a legal claim into an equitable one merely by demanding an injunction requiring the payment of money. *Penn Terra Ltd. v. Department of Env. Resources,* 733 F.2d 267, 276 (3d Cir.1984) (quoting *Jaffee v. United States,* 592 F.2d 712, 715 (3d Cir.1979)). Here, virtually all the relief sought is remediable by money damages. The only truly equitable relief sought in this case is an order requiring Mellon to provide adequate notice of its sweep fees to trust beneficiaries and to tie future sweep fees to the cost of providing the service. Plaintiff, however, has not presented the district court with any data whatsoever regarding Mellon's estimated cost of complying with such an order. Accordingly, we could not consider that cost even if we were to agree with Upp's "defendant's cost" theory.

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and in a unique amount that in theory must be proved separately. *See Sellers,* 701 F.2d at 579. Second, aggregation has been allowed when plaintiffs join to abate a continuing nuisance, even when a pendent claim for damages is present as well. *See Justice v. A.T. & S.F. Ry. Co.,* 927 F.2d 503 (10th Cir.1991). Nothing like that is even remotely present here.

Nor does *Hunt v. Washington State Apple Advertising Comm.,* 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), help plaintiffs. There, a state agency sued individually to enforce the rights of its members, not as representative of a class. The issue in *Hunt* was the constitutionality of a state statute, the suit having been brought under federal question jurisdiction, 28 U.S.C. § 1331, which at that time had an amount in controversy requirement. The *Hunt* Court, while it took into account the losses of the plaintiff's members for jurisdictional purposes, was not faced with the diversity-based class action situation present here. We are convinced that the Supreme Court did not intend to overrule *Snyder sub silentio* when it decided *Hunt.*

III.

Because the requisite amount in controversy was, to a legal certainty, never recoverable, the district court lacked subject matter jurisdiction over the case. We will therefore vacate its judgment and remand with instructions to dismiss the complaint.

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

John B. Upp, et al.

v.

MELLON BANK, N.A.

Civ. A. No. 91-5219.

United States District Court,
E.D. Pennsylvania.

Aug. 7, 1992.

C. Oliver Burt, III, Greenfield & Chimicles, Haverford, Pa., for plaintiffs.

Thomas McGough, Jr., Reed Smith Shaw & McClay, Philadelphia, Pa., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KATZ, District Judge.

FINDINGS OF FACT:

Defendant Mellon Bank, N.A. ("Mellon" or the "Bank") is the successor-in-interest to named defendant Mellon Bank (East), N.A., and to Girard Trust Corn Exchange Bank, later named Girard Trust Bank ("Girard"), which Mellon acquired.

Mellon is a banking association organized under the laws of the United States with its head office in Greensburg, Westmoreland County, Pennsylvania and its executive offices in Pittsburgh, Pennsylvania.

Mellon maintains banking offices in this District, including offices at Mellon Bank Center, 1755 Market Street, Philadelphia, Pennsylvania.

Mellon conducts bank trust operations in the Commonwealth of Pennsylvania.

Beginning in mid-1990, Mellon consolidated the charters of Mellon Bank (East), N.A., Mellon Bank (North), N.A., Commonwealth National Bank, and Mellon Bank (Central), N.A. into the single charter of Mellon Bank, N.A.

Plaintiff John B. Upp, a citizen of the State of Maryland, is a beneficiary of three trusts for which Girard was the original trustee and for which Mellon is now the successor trustee.

Plaintiff is an income beneficiary on certain trusts set up by his grandmother and mother. Plaintiff's mother and grandmother appointed Mellon's predecessor, Girard Bank, as trustee to administer and manage the principal and income of the trusts.

Mr. Upp is the beneficiary of three trust accounts managed by Mellon that have been charged sweep fees. Since 1981, Mr. Upp's accounts have been charged sweep fees of approximately $4,012.14.

In January, 1981, Girard became the first bank in Pennsylvania to provide its trust customers with the opportunity to earn a return through the daily temporary investment of idle cash.

Girard inaugurated an automated system for short-term investment of cash in trust accounts, known as sweeping, on January 1, 1981 for substantially all of its trust accounts.

From the beginning, Girard swept both principal and income cash balances.

Girard was the first bank in Pennsylvania to have a cash sweep system and to charge sweep fees to its trust customers.

When Girard began its cash sweep in 1981, it charged 37 and 1/2 basis points, or $0.375 for every $100 invested in these sweep investments, on an annual basis.

In 1981-82 in Pittsburgh, Mellon designed and developed a system and procedure for the daily temporary investment of idle cash, which was implemented in January, 1983.

In 1984, the Pennsylvania Legislature amended the Estates and Fiduciaries Code 20 Pa.C.S. § 7315.1(b), to permit a fiduciary to "make temporary investment of funds" in short term deposits or investments for which the fiduciary may "make a reasonable charge, in addition to all other compensation to which he is entitled . . . ". The amended statute became effective October 12, 1984.

The parties have agreed that the rate of Mellon's sweep fee has been 50 basis points since 1985. That is, if $100 was temporarily invested by Mellon every day for one year, the total charge for the entire year for the temporary investment services would be 50 cents.

Mellon changed the sweep system in 1985 so that swept cash from on Mellon bank affiliate (such as Mellon (East)) could be deposited automatically in another, separately chartered Mellon bank affiliate (such as Mellon (Delaware)), a process which enabled Mellon to obtain the maximum FDIC insurance coverage of $100,000 on the deposits in each bank. By 1986, Mellon had four affiliate banks participating in the cash sweep, and the

sweep system could accommodate amounts of up to $400,000 with FDIC insurance coverage.

Mellon ended the multi-bank sweep system in 1990 when it consolidated the charters of several bank affiliates into Mellon's charter.

When Girard instituted sweeping in 1981, and Mellon began sweeping income cash in January, 1983, and principal cash from some accounts in September, 1983, both banks sent a letter to trust customers informing them of the new service and, in general terms, the fee charged for it.

Girard sent periodic account statements to trust customers, and the sweep fee, described in general terms, was included in "stuffers" included each time the statements were mailed.

None of this generalized information about sweep fees conveyed the application of the fees to particular accounts in meaningful terms.

Defendant Mellon charges a fee to its trust customers for combining relatively small amounts in various trust funds, which would otherwise be idle, and then investing the aggregate amount. This practice is known as "sweeping," hence the fee is called a "sweep fee." In so doing, the bank is charging an excessive fee for the service. The bank charges a standard fee for managing the trust funds and then "double dips" to charge an unreasonable sweep fee for its services. It is as if Mellon charged a fee for managing the trust funds and then charged separate exorbitant fees for writing letters, making telephone calls, and the other mechanics of investing the trust funds. Mellon

knows it is "double dipping" and intends to do so to meet revenue goals. The sweep fees are far out of proportion to a reasonable charge for that service. In short, by charging excessive sweep fees, Mellon is simply feathering its own nest at the expense of funds it holds in trust.

Mellon's Trust and Investment Department ("TID") assesses an annual management fee, expressed in Mellon's fee schedules as a base fee plus a fee based upon the amount of assets managed. This fee is a reasonable charge for the bank's services. The sweep fee is an additional charge on that portion of the trust funds that have daily availability and are "swept." This fee is an excessive charge for the sweeping services. In accounts administered by TID, the assets on which Mellon charges a sweep fee are also included in the assets on which it charges a management fee. In those accounts, the sweep fee is unfair, duplicative, and an overcharge.

The operating margin associated with the sweeping function is far out of proportion to the operating margins associated with other services Mellon provides. Sweeping generated well over $7,000,000 in revenue for 1991. The costs of developing and enhancing the computer system never exceeded $100,000 in any year, although Mellon does not have a practice of tracking and allocating such costs. Consequently, the operating margin for sweeping was over 7,000%.

Although not determinative of the point in issue, but by way of comparison, TID's overall 1991 operating margin was approximately 45% on total revenues of approximately $300,000,000. Mellon's overall profit margin for 1991 before taxes and extraordinary gains was slightly

below 10% and that figure net of total TID service fees was about 6%.

In late 1981, the Office of the Comptroller of the Currency took the position that national banks holding funds as fiduciaries must generally invest those funds in income-earning accounts. In 1982, a regulation to that effect was promulgated.

In 1982, one of the developers of the computer system used by Mellon to execute the sweeping procedure, estimated that the direct cost of developing the system would be $73,463.50. Plaintiffs' Exhibit 28. There was even a lower estimate of $58,277.50. Plaintiffs' Exhibit 65.

The largest continuing "cost" listed in that developer's report was lost revenue of $3,000,000. Plaintiffs' Exhibit 90. There was also a cost benefit "loss" of $9,488,705 estimated over five years. Plaintiffs' Exhibit 28. This was an estimate of the "loss" of interest Mellon would suffer compared to what it previously had earned and retained on the idle funds. This is hardly a "cost" since the interest belonged to the trusts, not to Mellon.

The head of TID, categorized computerized sweeping as a function of the trust accounting system rather than as a separate product or service. The bank does not allocate any costs to the cash sweep system and has never done so. Mellon employees testified that in addition to automatic computer functions, there are costs for manual services that must be performed as part of the sweeping process, but they were unable to estimate what those costs might be. No one at Mellon has ever tried to determine the total amount of sweep fee expenses or make an

analysis relating sweep fee revenues to expenses. In any case, such costs and expenses would be nominal.

The original plan for sweeping included no fee for the act of sweeping. Rather, the cost of the procedure was to be incorporated into the next revision of the TID Pricing Schedule. On Oct. 13, 1982, the Trust Pricing Committee adopted a policy pursuant to which an annualized fee of $0.30 per $100 of cash invested would be established for sweeping income in Personal Financial Services Division accounts. In 1983, the bank started to sweep income in trust and fiduciary accounts and to charge the fee of $0.30 per $100 of cash invested as part of a new, higher schedule of fees. The letter informing TID customers of the new fees stated that the sweeping procedure created a new benefit for them which justified the new fees.

On Sept. 1, 1983, Mellon began sweeping cash from principal balances on directed trust and custody accounts. Six days later, the Trust Pricing Committee approved a fee of $0.30 per $100 of cash invested for doing so. Again, a letter to customers informed them in general terms of the fees, but Mellon did not reflect the application of the fees to customers' accounts in meaningful terms which would communicate the extra charges so that they could be understood by the average customer.

At approximately the time that the bank started sweeping funds from principal, it also effected an annualized internal charge of $0.15 per $100 of funds swept, a charge which remains in place up to the present. This additional fee is compensation allocated by the bank's

financial side to TID for the use of swept funds. Customers do not pay the $0.15 fee "directly." Rather, the charge allocated to the financial side is reduced by that amount.

In 1985, the bank increased its standard sweep fee for income cash from all accounts, and for principal cash from directed trust accounts and custody accounts, to $0.50 per $100 a year. A fee of the same amount was also imposed on all principal cash invested in any vehicle with daily liquidity, regardless of whether it was invested via the sweep system. Plaintiffs' Exhibit 85. These fees are still in effect.

As a result of fee negotiations, some accounts are charged lower management fees, which are reasonable.

Mellon did not inform personal trust customers, in meaningful terms, of the application of sweep fees charged to particular accounts until 1986. Previously, it reported only the net amount of interest earned from the sweep. Mellon concealed the excessive sweep fees before 1986 by reporting only the net interest earned from the sweep. Advising beneficiaries generally of the sweep fees hardly justified misleading them by netting out the fees on their statements. The present method of disclosure, not adopted until March, 1986, involves a notation that describes the sweep interest posting, including a separately stated sweep fee, but does not make a line item disclosure, the way the bank posts other fees.

Mellon recognized that it could not charge sweep fees on the ERISA accounts it managed after a Department of Labor audit and refunded those sweep fees to the ERISA accounts with interest.

In choosing where to invest swept funds, Mellon selected investment vehicles in which it had an interest and favored them over independently managed investment funds.

The total amount of sweep fees collected since 1981, including fees collected by Girard, is approximately $55,638,000 as follows:

1981	$2,330,000
1982	2,032,000
1983	2,099,000
1984	2,995,000
1985	2,974,000
1986	4,899,000
1987	7,299,000
1988	8,028,000
1989	7,097,000
1990	7,984,000
1991	7,901,000
	$55,638,000

Simply stated, Mellon charges its fiduciary accounts a management fee plus a "sweep fee" for depositing uninvested trust funds in interest bearing accounts. Mellon demonstrates no cost to itself for this "sweeping" service. The millions of dollars of sweep fees collected are profit. This profit is in addition to the highly profitable charges Mellon makes for administering its trust accounts. The original computer programs to accomplish this sweeping of idle funds costs less than $100,000. The cost of sweeping is a de minimus offset to the millions of dollars of sweep fees collected each year. Before sweeping idle trust cash into investments, Mellon treated the idle trust funds as a kind of no interest Christmas Club trust account for its own benefit. Sweeping provides a

high sounding benefit to the trusts. It is nothing of the sort. It is no more a benefit than would be more mundane deposit of idle trust cash in a savings account. The simple computerized program to accomplish this is a benefit for the bank, because the sweeping operation is cheaper than a manual trust-by-trust deposit of idle cash into savings. There could be a reasonable fee for sweeping services in some cases, in some banks. In Mellon's case, the record shows no rational basis that the sweep fees charged are reasonable. The ongoing costs are close to zero on the record before me.

That a selected small sample of other banks or plaintiffs' expert's former employer charge sweep fees hardly justifies Mellon's practice. In any event, we do not know the other banks' costs or service for the fees, or whether the other banks' fees are reasonable.

Mellon clothes the sweeping service in a aura of complexity. It is a simple computer program.

The trust department is a significant profit center compared to Mellon's other operations. The sweep fee program is simply piling on more fees in that profit center to meet perceived revenue goals. It is an acknowledged "double dip" on the already profitable fees for managing trust accounts.

Before the computer age, it seems doubtful that Mellon could charge a reasonable fee for managing trust assets and then charge a "sweep" fee for sweeping otherwise idle cash, for example, into a savings account. There is no evidence that small deposits in savings accounts are traditionally rejected by banks. Nor is there evidence that banks traditionally charge for small savings deposits.

Surely, banks may charge reasonable sweep fees. This is not the issue. The issue is whether the sweep fees charged by this bank are unreasonable. I find that they are on the record before me.

Essentially, Mellon's sweep fee is arbitrary. Its charge does not take into account what the investment produces. To claim that some other banks do it hardly measures a market value for the service. Defendant's expert's survey was not a persuasive survey of the market. Mellon was not meeting competition. It was taking advantage of a lack of competition. An irrevocable trust or even a revocable trust naming Mellon as trustee is in a rather inelastic demand position.

It begs the question to say that sweeping earned some benefits for the trust. Rather, the issue is whether Mellon deprived the trusts of a portion of the benefits to which they were entitled by charging an unreasonable fee for sweeping. Mellon had a fiduciary duty to invest idle cash. The sweeping was the most simple and economical way to satisfy Mellon's fiduciary responsibilities. The sweep fee was bad form, but it was Mellon's form. The sweep fee was bad substance on this record because there was no rational justification for it. One of Mellon's sophisticated managers suggested in his trial testimony that the notion of sweep fees was on its way out at least for some portion of the Bank's business. Simply to say it is a reasonable charge does not make it so.

With the greatest respect for the Orphans Court of Montgomery County, I must decide this matter on the record before me. On that record, I find Mellon's sweep fees unreasonable.

Sweeping is jargon for crediting trusts with income the Bank has earned with the trusts' money on deposit. One can imagine a reasonable charge for making such an appropriate bookkeeping entry on the trusts' accounts, but this is not it. Mellon has used its authority to charge a reasonable fee for the purpose of imposing an unreasonable one. The sweep fees, combined with Mellon's standard and specially negotiated fees, are unreasonable to the extent of the sweep fees.

Punitive damages are particularly appropriate here because Mellon's most significant rationale for charging sweep fees, i.e., the Bank was "losing" interest on trust funds which do not even belong to it, is outrageous. The bank's stated intention to "double dip" shows a bad motive for the charges. Punitive damages, awarded to the class representative who initiated the action, are an appropriate way to deter such conduct in the future. While the other members of the class have a colorable claim for such damages, such an award would be excessive.

CONCLUSIONS OF LAW:

This court has subject matter jurisdiction over this diversity action because the amount in controversy, exclusive of costs and interests, is in excess of $50,000. Punitive damages may be considered in determining whether the jurisdictional amount requirement has been satisfied. *Klepper v. First American Bank*, 916 F.2d 337, 341 (6th Cir.1990).

This court is not bound by the accounting in the Orphans Court regarding the reasonableness of the

sweep fees. Under Pennsylvania law, the doctrine of collateral estoppel applies only if there has been a final judgment on the merits. *Schroeder v. Acceleration Life Ins. Co. of Pa.*, No. 91-3518, slip op., at 8, 972 F.2d 41, 45 (3d Cir. July 31, 1992). There is no such final judgment here, until state court appeals are exhausted. Mellon's lawyer suggested that he expected the Orphans Court to rule on pending exceptions momentarily. Plaintiffs' attorney has made clear his intention to appeal any adverse result in the Orphans Court.

For the reasons articulated in the court's Orders of May 29, 1992 and June 24, 1992, plaintiff class was properly certified. However, the court's Order of May 29, 1992, is modified as follows: The plaintiff class is limited to beneficiaries of trust accounts for which defendant charges a management fee of which defendant is trustee.

As a fiduciary, Mellon owes a duty of loyalty and candor to the trust beneficiaries: it must deal with them fairly, administering the trust funds solely in their interest, and disclose all facts that it knows or reasonably should know regarding all transactions involving their accounts. *Comerford's Estate*, 388 Pa. 278, 130 A.2d 458 (1957).

Mellon's belated disclosure of the sweep fees in meaningful terms is a breach of its fiduciary duty of candor. Mellon also breached its fiduciary duty of loyalty by charging excessive sweep fees, in addition to its management fee.

Punitive damages may be recoverable from a self-dealing trustee. *Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951); *Schoenholtz v. Doniger*, 657

F.Supp. 899, 913-15 (S.D.N.Y. 1987); *see also Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa.Super. 336, 499 A.2d 637 (1985). The finder of fact has determined that there has been conduct which, in light of the circumstances, including the wrong-doer's motivation and its relationship to the aggrieved parties, is especially egregious. An award for punitive damages is appropriate to deter future overcharges to its trust accounts by Mellon.

JUDGMENT

AND NOW, this 7th day of August, 1992, judgment is entered in favor of plaintiff, John B. Upp, and against defendant Mellon Bank, N.A. in the amount of $75,000 for punitive damages. Defendant Mellon Bank, N.A. shall reimburse the trusts of which the members of plaintiff class are beneficiaries its sweep fees charged to those trusts plus the interest that would have been earned by the trusts on those sweep fees to the date of such reimbursement.

The enforcement of the second sentence of this judgment is stayed during the period after its entry and while a timely appeal is taken and during the pendency of the appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN B. UPP, ET AL.	)	CIVIL ACTION
	)	
v.	)	NO. 91 – 5229
	)	
MELLON BANK, N.A.	)	

JUDGMENT

AND NOW, this 7th day of August, 1992, judgment is entered in favor of plaintiff, John B. Upp, and against defendant Mellon Bank, N.A. in the amount of $75,000 for punitive damages. Defendant Mellon Bank, N.A. shall reimburse the trusts of which the members of plaintiff class are beneficiaries its sweep fees charged to those trusts plus the interest that would have been earned by the trusts on those sweep fees to the date of such reimbursement.

The enforcement of the second sentence of this judgment is stayed during the period after its entry and while a timely appeal is taken and during the pendency of the appeal.

BY THE COURT:

/s/ Marvin Katz
Marvin Katz, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PARKER W. PACKARD and JOHN B. UPP individually and on behalf of all others similarly situated,	)	Civil Action No. 91-5229
Plaintiffs,	)	Class Action
v.	)	
PROVIDENT NATIONAL BANK and MELLON BANK (EAST), N.A., individually and on behalf of all others similarly situated,	)	
Defendants.	)	

ORDER RE: CLASS CERTIFICATION

(Filed May 29, 1992)

AND NOW, this 29th of May, 1992, upon consideration of plaintiffs' renewed motion to certify a plaintiff class, and defendant's response thereto, it is hereby ORDERED that plaintiffs' motion is GRANTED, and that (1) a Plaintiff Class is certified herein consisting of all persons who are beneficiaries of trusts, estates, or other accounts the principal and/or income of which is managed or invested by or on behalf of defendant Mellon Bank, N.A. and any of its predecessor or affiliate banks for a fee; (2) Mr. John B. Upp is certified as the class representative; and (3) plaintiffs' counsel is designated as class counsel.

I am satisfied that the numerosity, commonality and typicality requirements are met, that plaintiff is an adequate class representative and that the class action is maintainable under Rule 23(b)(2) and 23(b)(1)(A). With

experienced counsel on the case, the representative will fairly and adequately protect the interests of the class.

BY THE COURT:

/s/ Marvin Katz, J.
Marvin Katz, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PACKER [sic] W. PACKARD and JOHN B. UPP	)	
v.	)	CIVIL ACTION
PROVIDENT NATIONAL BANK and MELLON BANK (EAST), N.A.	)	NO. 91-5229

ORDER

(Filed June 24, 1992)

AND NOW, this 24th day of June, 1992, upon consideration of Defendant Mellon Bank's Motion for reconsideration of the court's Order granting class certification or, alternatively, certification that the Order involves controlling questions of law about which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, and the response of the Plaintiff Class, it is ordered that the motion is **DENIED.**

The certified Plaintiff Class satisfies the requirements of Rule 23(a). The class is so numerous that joinder of all members is not practicable. Even if significantly smaller than plaintiffs' estimate of 5,000, it is numerous enough to make joinder impracticable. *See Eisenberg v. Gagnon*, 766 F.2d 770, 785-86 (3d Cir. 1985) (allegation of over 90 geographically dispersed plaintiffs satisfies requirement).

The allegations of breach of fiduciary duty toward all class members create common issues of law and fact. *See Klamberg v. Roth*, 473 F.Supp. 544 (S.D.N.Y. 1979) (issues of

breach of fiduciary duty likely to be similar for all beneficiaries).

Since plaintiffs' claims arise from the same course of conduct affecting the other members of the class, they satisfy the typicality requirement. *See Eisenberg,* 766 F.2d at 786.

Plaintiff Upp fairly and adequately represents the interests of the class because his interests are not antagonistic to those of other class members, and he has retained experienced, competent counsel to conduct the litigation. *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 449 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978); Greenfield & Chimicles Firm Resume, Ex. B to Plaintiff's Motion for Class Certification.

A class action is maintainable under Rule 23(b)(2) because defendant Melon [sic] has allegedly acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Certification pursuant to Rule 23(b) 1 is also appropriate. *Meyer v. Citizens and Southern Nat'l Bank,* 106 F.R.D. 356, 362 (M.D. Ga. 1985).

An interlocutory appeal is not justified. An immediate appeal would delay rather than materially advance the ultimate termination of this case.[1]

By the Court:

/s/ Marvin Katz, J.
Marvin Katz, J.

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[1] Counsel shall advise the court within 10 days by stipulation or consent whether they are agreed to try this case before this court non-jury or before the magistrate judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1753

PARKER W. PACKARD;
JOHN B. UPP, Individually and on behalf of all others similarly situated

JOHN B. UPP,
Appellee

v.

PROVIDENT NATIONAL BANK;
MELLON BANK (EAST), N.A., Individually and on behalf of all others similarly situated

MELLON BANK, N.A.,
Appellant

PENNSYLVANIA BANKERS ASSOCIATION;
PROBATE AND TRUST LAW SECTION OF THE ALLEGHENY COUNTY BAR ASSOCIATION;
AMERICAN BANKERS ASSOCIATION;
ASSOCIATION OF BANK HOLDING COMPANIES; and
INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
Amicus-Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ _____
Circuit Judge

Dated: Jun 18 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PARKER W. PACKARD and JOHN B. UPP,
Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PROVIDENT NATIONAL BANK and
MELLON BANK (EAST), N.A.,
Individually and on behalf of all others similarly situated,

Defendants.

CIVIL ACTION NO. 91-CV-5229

CLASS ACTION

JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, Parker W. Packard and John B. Upp, by and through their attorneys, hereby complain against defendants as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction, pursuant to 28 U.S.C. § 1332, over this action between citizens of different States where the amount in controversy, including punitive damages, exceeds the sum of $100,000 exclusive of interest and costs. Moreover, plaintiffs seek injunctive relief to protect rights the value of which, in the aggregate, exceeds the sum of $100,000.

2. Venue is proper in this District since the defendants have their principal places of business or conduct

business within the District and some or all of the acts of which plaintiffs complaint took place within this District.

PARTIES

3. (a) Plaintiff Parker W. Packard is a citizen of the State of New York. Plaintiff Packard brings this action in his own right and on behalf of the Plaintiff Class as herein defined.

(b) Plaintiff Packard is and at all relevant times has been a trust beneficiary, the principal and income of which is "managed" by defendant Provident National Bank ("Provident") as trustee. Therefore, plaintiff Packard has standing to maintain this action.

(c) Plaintiff John B. Upp is a citizen of the State of Maryland. Plaintiff Upp brings this action in his own right and on behalf of the Plaintiff Class as herein defined.

(d) Plaintiff Upp is and at all relevant times has been a trust beneficiary, the principal and income of which is "managed" by defendant Mellon Bank (East), N.A. ("Mellon") as trustee. Therefore, plaintiff Upp has standing to maintain this action.

4. Defendant Provident, with offices at 17th and Chestnut Streets in Philadelphia, is a bank with significant trust operations in the Commonwealth of Pennsylvania.

5. Defendant Mellon, with offices at Mellon Bank Center, 18th and Market Streets in Philadelphia, is a bank with significant trust operations in the Commonwealth of Pennsylvania.

CLASS ACTION ALLEGATIONS

The Plaintiff Class

6. Plaintiffs bring this action pursuant to Federal Rule of Civil Procedure 23 on behalf of a class (the "Plaintiff Class") consisting of all persons who are beneficiaries of trusts, estates, or other accounts the principal and/or income of which is "managed" or invested by or on behalf of defendants or any other member of the Defendant Class (as hereinafter defined) for a fee.

7. The members of the Plaintiff Class are so numerous that joinder of all members is impracticable. It is believed that the number of such persons exceeds five thousand.

8. Plaintiffs' claims are typical of the claims of the other members of the Plaintiff Class.

9. Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class and plaintiffs have no interests conflicting with the interests of the Plaintiff Class. Plaintiffs have retained competent counsel experienced in the prosecution of class and other complex litigation.

10. Questions of law and fact common to the members of the Plaintiff Class predominate over any questions affecting only individual members of the Plaintiff Class. Among the predominating common questions of law and fact are the following:

(a) whether defendants and members of the Defendant Class owe a fiduciary duty to members of the Plaintiff Class;

(b) whether defendants and members of the Defendant Class have breached their fiduciary duty;

(c) whether defendants and members of the Defendant Class have violated applicable Pennsylvania law;

(d) whether the members of the Plaintiff Class have sustained damages and, if so, the proper measure of damages; and

(e) whether defendants and members of the Defendant Class have engaged in practices which should be enjoined.

11. A Class Action is superior to other available methods for the fair and efficient adjudication of this controversy.

The Defendant Class

12. Plaintiffs bring this action pursuant to Rule 23 on behalf of the Plaintiff Class against, *inter alia*, each of the named defendants and the members of the Defendant Class.

13. The Defendant Class consists of all banks or other financial institutions (including trust companies), exercising trust powers, which operate in Pennsylvania and all bank holding companies that own subsidiary banks which operate in Pennsylvania and which charge fees to purportedly manage or invest the principal and/or income of trusts, estates, or other similar accounts ("trust accounts") for the benefit of members of the Plaintiff Class. Collectively, the defendants and the members of the Defendant Class are referred to herein as the

"Banks." Excluded from the Defendant Class are those Banks which charge a "sweeping" fee of 10 basis points (i.e. .1%) or less or, when any such charges are made on a "per-sweep" basis (i.e. "activity"), which charge a fee of 10¢ or less therefor.

14. The members of the Defendant Class are so numerous that joinder of all members is impracticable. It is believed that more than 100 banks, trust companies or bank holding companies are members of the Defendant Class.

15. Plaintiffs' claims against the named defendants are typical of the claims against all members of the Defendant Class.

16. The named defendants will fairly and adequately protect the interests of the Defendant Class and the named defendants have no interests conflicting with the interests of the Defendant Class. The named defendants have retained or will retain competent counsel experienced in the defense of Class Action and other similar complex litigation.

17. Questions of law and fact common to the members of the Defendant Class predominate over any questions affecting only individual members of the Defendant Class. Among the predominating questions of law and fact are the following:

(a) whether defendants and members of the Defendant Class owe a fiduciary duty to the respective members of the Plaintiff Class with whom they do business;

(b) whether defendants and members of the Defendant Class have breached their respective fiduciary duties to members of the Plaintiff Class;

(c) whether the members of the Plaintiff Class have sustained damages and, if so, the proper measure of damages;

(d) whether the members of the Defendant Class have violated applicable Pennsylvania law; and

(e) whether the defendants and members of the Defendant Class have engaged in practices which should be enjoined.

FACTUAL BACKGROUND

18. For many years, members of the Defendant Class have managed and invested the principal and/or income of trust accounts, including those of plaintiffs. Historically, these Banks have collected management or other fees in return for their purported services.

19. By the late 1970s, members of the Defendant Class had become sufficiently computerized to permit them to automate the investment of principal and income "cash" on a daily basis. As a result, the Banks began to "sweep" (a process whereby the uninvested cash in each account is transferred on a daily or other basis to an accumulation account for temporary investment) such available funds.

20. These "sweep" funds are invested with external mutual funds (including affiliated mutual funds), internal common funds, time open deposit accounts and otherwise (collectively, "the Funds") on a short-term basis and

began to charge additional fees for this investment "service", usually based upon the amount of income invested or on a per transaction ("activity") basis. This practice is known as "sweeping".

21. In 1984, the Pennsylvania legislature permitted the extra investment fee for such temporary investments, when a service was truly rendered, authorizing the Banks to make "a reasonable charge, in addition to all other compensation to which [they are] entitled, for services rendered in making the temporary investment." 20 Pa.C.S. § 7315.1(b).

22. In addition, Congress permitted the Banks to charge fees to act as advisors to mutual funds. Thereafter, members of the Defendant Class, when it served their own interest, began to shift income and/or principal from certain of their accounts into the Funds, including controlled and affiliated mutual funds or other funds from which they derived income directly or indirectly, where they invested such income and/or principal *for a fee.*

23. To take advantage of their unique role as fiduciaries with respect to members of the Plaintiff Class and the control they maintained over their respective accounts, members of the Defendant Class charge trust accounts a fee for this temporary investment "service" while they do not charge similarly-situated commercial or other accounts a fee for the same service.

24. In addition, members of the Defendant Class have "swept" the principal and/or income from trust accounts and invested such sums in the Funds, also for a fee, although such charges are prohibited pursuant to the

Employee Retirement Income Act of 1974 ("ERISA") where the Banks have discretionary investment authority.

25. Managers of these trust accounts are under a duty to invest the available principal and/or interest for the exclusive benefit of trust beneficiaries, including Plaintiffs and members of the Class. By "sweeping" trust principal and/or income into the Funds, members of the Defendant Class are merely fulfilling their fiduciary obligations to trust beneficiaries, but are charging unreasonable, unjustifiable and excess fees for their purported "services", which are nothing more than computerized book entries carried out automatically with appropriate "software" in place.

CLAIM FOR BREACH OF FIDUCIARY DUTY

26. Plaintiffs incorporate by reference paragraphs 1 through 25 above as if set forth herein at length.

27. Defendants and the members of the Defendant Class owe a fiduciary duty to plaintiffs and to the members of the Plaintiff Class which, at a minimum, requires the Banks to invest trust account principal and/or income in such a manner as a prudent man would in the exercise of ordinary diligence. In addition, such fiduciary duty requires members of the Defendant Class to treat members of the Plaintiff Class with utmost fairness and candor.

28. By virtue of their fiduciary duty owed to the plaintiffs and the members of the Plaintiff Class, defendants and the members of the Defendant Class cannot

engage in any transactions in which they have any interest of such a nature that it might affect their judgment as has been the case heretofore.

29. Defendants and the members of the Defendant Class have breached their duty to plaintiffs and members of the Plaintiff Class in at least the following material respects:

(a) they have invested trust account principal and/or income in the Funds, in which they have a direct or indirect monetary interest, primarily for the Banks' own benefit;

(b) they have charged unreasonable, excessive and repetitive fees for their purported "services";

(c) they have created an irreconcilable conflict of interest by investing in the Funds, in which they have a direct or indirect monetary interest, which are transactions that might affect and have affected their judgment;

(d) they have charged members of the Plaintiff Class fees for services which they do not charge other customers for performing; and

(e) they have failed adequately to disclose to members of the Plaintiff Class the nature and extent of the fees they are charging and/or receiving, directly or indirectly.

30. As a direct and proximate result of the breach of fiduciary duty described above, plaintiffs and members of the Plaintiff Class have been damaged in amounts which cannot presently be determined.

31. Unless enjoined, the members of the Defendant Class will continue to breach their fiduciary duty owed to plaintiffs and members of the Plaintiff Class.

PRAYER FOR RELIEF

WHEREFOR, plaintiffs, on behalf of themselves and the members of the Plaintiff Class, demand judgment against defendants and the other members of the Defendant Class, as follows:

(a) an Order certifying this action as a Class Action with plaintiffs and their counsel as representatives of the Plaintiff Class and defendants as representatives of the Defendant Class;

(b) an Order declaring that the conduct of the members of the Defendant Class is unlawful;

(c) a judgment against the members of the Defendant Class in an amount necessary to compensate the members of the Plaintiff Class fully for their damages plus interest, together with punitive damages of not less than $100,000;

(d) an Order awarding plaintiffs their costs of suit, counsel fees and experts' fees;

(e) an injunction against future unlawful conduct by defendants and the members of the Defendant Class, including, *inter alia*, requiring such parties to charge "sweeping fees" consistent with their actual cost of providing the "service," requiring the Banks to make disclosure to plaintiffs and the members of the Plaintiff Class of *all* fees and other consideration or benefit

received by them, directly or indirectly, from the investment of the funds of plaintiffs and members of the Plaintiff Class derived from the practice of "sweeping" and requiring the Banks to cease and desist from engaging in the self-dealing described herein; and

(f) such other and further relief as is just and proper.

DATED: August 15, 1991

GREENFIELD & CHIMICLES

By: /s/ Richard D. Greenfield
Richard D. Greenfield
RG-4046
Mark C. Rifkin
Frank A. Rothermel
One Haverford Centre
Haverford, PA 19041
(215) 642-8500

Attorneys for Plaintiffs and the Plaintiff Class